elaborate its reasoning, provides a poor vehicle with which to resolve the preemption question presented. For these reasons, further review is unwarranted.

### A. Petitioner Rests Her Allegation Of A Deep Circuit Split On A Mischaracterization Of The Third Circuit's Holding In *Abdullah*

Petitioner bases her allegation of a deep circuit split on a misreading of *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999). *Abdullah* does not, as Petitioner misstates, hold that "any state claim relating to aviation safety is federally preempted." Pet. at 9. Rather, in response to a certified question from the district court, the *Abdullah* court held that: (1) "federal law preempt[s] the standards for air safety," but that (2) "despite federal preemption of the standards of care, state and territorial damage remedies still exist for violations of these standards." 181 F.3d at 365. In other words, *Abdullah* held that a plaintiff may seek state-law remedies for violation of aviation safety standards, but such claims must seek to vindicate alleged violations of federal – not state – safety standards. This two-part holding applied the principle, previously recognized by this Court, that the federal government's "exclusive authority to set safety standards [does] not foreclose the use of state tort remedies." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 253 (1984); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1441 (10th Cir. 1993), *cert. denied*, 510 U.S. 908 (1993) ("Congress may reserve for the federal government the exclusive right to regulate safety in a given field, yet permit the states to maintain tort remedies covering much the same territory." (citing *Silkwood*, 464 U.S. at 253)). An accurate reading of *Abdullah* reveals that most of the cases cited by

Petitioner do not conflict with either of *Abdullah*'s holdings. We discuss each of these cases in turn.

### B. No Disagreement Exists Among The Circuits On The Viability Of State-Law Remedies For Violations Of Federal Aviation Safety Standards; Moreover, The Sixth Circuit's Opinion Below Is Not A Suitable Vehicle With Which To Address The Issue

No disagreement exists among the circuits on *Abdullah*'s second holding regarding the existence of state-law remedies for violations of federal aviation safety standards. Those circuits that have addressed this question agree with *Abdullah* that such state-law remedies are not preempted. In *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995) (*en banc*), the Fifth Circuit held that the Airline Deregulation Act did not preempt plaintiff's state-law tort claim for physical injury suffered on a commercial airline flight. This holding is entirely consistent with the Third Circuit's holding in *Abdullah* that, despite federal preemption of state aviation safety standards, "state and territorial damage remedies still exist for violation of" federal standards. 181 F.3d at 365. Indeed, the *Abdullah* court recognized as much. *See id.* at 372 (citing *Hodges* and stating that its result "may not, of course, be inconsistent with our determination that even with federal preemption of standards of care, state tort remedies are preserved").

The Tenth Circuit reached the same conclusion in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 510 U.S. 908 (1993). The *Cleveland* court held that the Federal Aviation Act, "by its very

words, ... leaves in place remedies [that existed] at common law or by statute" at the time of its enactment. 985 F.2d at 1442-43; *see also id.* at 1441 ("Congress may reserve for the federal government the exclusive right to regulate safety in a given field, yet permit the states to maintain tort remedies covering much the same territory."); *id.* at 1443 ("There is nothing inconsistent with Congress's goal of maximum safety and common law claims."); *id.* at 1444 ("Congress has intended to allow state common law to stand side by side with the system of federal regulations it has developed.").

Moreover, even if this Court wishes to consider this issue on the merits, the instant case does not present an opportunity to do so because the Sixth Circuit's decision below did not consider the viability of state-law remedies. In the decision below, the Sixth Circuit panel affirmed the district court's grant of summary judgment on Petitioner's failure-to-warn claim. *Greene*, 409 F.3d at 794. In so doing, the panel "agree[d] with the Third Circuit's reasoning in *Abdullah* that federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation." *Id.* at 795. Nowhere in its opinion, however, did the panel consider or decide the discrete question of whether state-law damage remedies exist for violation of federal aviation safety standards. Granting certiorari in this matter would not, therefore, allow this Court to take up and resolve that question.

### C. Petitioner Overstates The Extent Of Disagreement Among The Circuits On The Question Of Whether Federal Law Preempts State Aviation Safety Standards

#### 1. Because The First Circuit Clearly Limited Its Preemption Holding In *French* To The Specific Field Of Pilot Qualification, *French* Is Much Narrower In Scope Than *Abdullah* And The Sixth Circuit's Opinion Below And Is Therefore Inapposite To The Alleged Circuit Split

Petitioner contends in error that both the First and Third Circuits have held that federal law preempts all tort claims related to aviation safety. Pet. at 9. This argument, mistaken in two respects, badly mischaracterizes the law of both circuits.

As discussed *supra* in Section I.A., *Abdullah* held that, although federal law preempts state standards of care for air safety, state-law remedies still exist for violation of federal standards. *Abdullah* did not hold, as Petitioner misstates, that federal aviation laws displace state-law remedies entirely (Pet. at 9), nor did the First Circuit's opinion in *French v. Pan American Express, Inc.*, 869 F.2d 1 (1st Cir. 1989). *French* simply did not reach the question of the continued viability of state-law remedies.

Rather, *French* held only that federal safety standards preempt those of the states in the specific field of pilot qualifications. *See id.* at 4 ("The intricate web of statutory provisions [under the FAA] affords no room for the imposition of state-law criteria *vis-à-vis pilot suitability*.") (emphasis added); *id.* at 6 ("It is this *precise field* [of pilot regulation] which we have concluded Congress intended to occupy to the exclusion of state law.") (emphasis added).

Because the First Circuit limited its holding in *French* to the specific field of pilot qualifications, that decision is much narrower in scope than *Abdullah* and the Sixth Circuit's decision below, both of which held that federal law preempts the *entire* field of aviation safety. *Abdullah*, 181 F.3d at 365 ("[W]e find implied federal preemption of the entire field of aviation safety."); *Greene*, 409 F.3d at 795 ("We agree with the Third Circuit's reasoning in *Abdullah* that federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation."). Indeed, the *Abdullah* court itself distinguished its decision from others that had held "that federal law only preempts discrete aspects" of state law, 181 F.3d at 365, and specifically cited *French* as one such narrow opinion, *id.* at 370. Because the scope of *French*'s holding is so much narrower than those of *Abdullah* and the Sixth Circuit's opinion below, *French* is inapposite to the circuit split at issue.

### 2. Fifth Circuit Law Does Not Conflict With The Third Circuit's Decision In *Abdullah* On The Question Of Whether Federal Law Preempts State Aviation Safety Standards

Contrary to Petitioner's claim, Fifth Circuit law does not conflict with *Abdullah* on the question of whether federal aviation law preempts state safety standards. Petitioner argues that *Abdullah* conflicts with the Fifth Circuit's decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (*en banc*) (Pet. at 9-10), but *Hodges* did not reach this question. As discussed *supra* in Section I.B., the *Hodges* court held that the Airline Deregulation Act did not preempt a state-law tort claim for physical injury

suffered on a commercial airline flight. In doing so, however, the *en banc* court expressly noted that "this decision . . . does not address the possible preemptive effect of [FAA] safety regulations governing aircraft and carriers," *Hodges*, 44 F.3d at 339 n.12, which is precisely the issue addressed by *Abdullah* and the Sixth Circuit's decision below.

The Fifth Circuit recently addressed this question, left open in *Hodges*, in *Witty v. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004), and came to a conclusion consistent with, though far more limited than, the Third Circuit's in *Abdullah*. *Witty* held that, because "Congress intended to preempt state standards for the warnings that must be given airline passengers," 366 F.3d at 383, "a state claim for failure to warn passengers of air travel risks . . . must be based on a violation of federally mandated warnings," *id.* at 385. The *Witty* court stated explicitly that its holding applied only to passenger safety warnings and did not extend as broadly as *Abdullah*'s, which applied to the entire field of aviation safety. *Id.* ("[W]e note our intent to decide this case narrowly by addressing the precise issue before us."). *Witty* nevertheless confirms that Fifth Circuit law does not conflict with the Third Circuit's holding in *Abdullah*. Both circuits have concluded that state aviation safety standards are preempted to some extent by federal aviation regulations. *Compare Witty*, 366 F.3d at 385 ("[F]ederal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements."), *with Abdullah*, 181 F.3d at 371 ("Because . . . Congress's intent was to federally regulate aviation safety, we find that *any* state or territorial standards of care relating to aviation safety are federally preempted.") (emphasis in original). As *Witty*

demonstrates, no conflict exists between the Third and Fifth Circuits on this question of law.

### 3. Of The Cases Cited By Petitioner, Only The Tenth Circuit's Decision In *Cleveland* Conflicts With The Law Of The Third And Sixth Circuits; This Shallow Split Does Not Warrant The Grant Of Certiorari

The only opinion cited by Petitioner that conflicts with *Abdullah* and the Sixth Circuit's decision below is the Tenth Circuit's decision in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993). *Cleveland* held that the plaintiff's defective-design claim was not preempted by the Federal Aviation Act ("FAA"). 985 F.2d 1438. The court reasoned that the FAA provides only "minimum standards," and that allowing states to adopt "additional or more stringent standards" is consistent with the purposes of Congress. *Id.* at 1445. Because "it is not impossible to meet both state common law standards and the federal regulations," *id.*, *Cleveland* required the defendant aircraft manufacturer to do so. This holding conflicts with *Abdullah* and the Sixth Circuit's decision below, both of which held that federal law preempts the entire field of aviation safety. *See Abdullah*, 181 F.3d at 365; *Greene*, 409 F.3d at 795.

This conflict presents only a shallow, two-to-one circuit split that does not warrant the grant of certiorari. When a single circuit disagrees with others on an issue, that circuit can itself reconsider its position and resolve the circuit split through its own processes, including *en banc* review. *See Groves v. Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990) ("Given the panel's expressed doubt

about the correctness of the Circuit precedent that it was following, together with the fact that there was a square conflict in the Circuits, it might have been appropriate for the panel to request a rehearing en banc."); *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (noting that "a circuit court may reexamine its own established interpretation of a statute if it finds the other circuits have persuasively argued a contrary conclusion . . . [and] [a]n en banc court may also set aside its own precedent if . . . it decides that a panel's holding on an important question of law was fundamentally flawed").

Moreover, allowing the issue to percolate further among the lower courts will give this Court the benefit of more considered approaches to the question. Currently, only *Abdullah* and *Cleveland* provide reasoned analyses on the preemption issue; as Petitioner herself points out, the Sixth Circuit's decision below devotes a scant page to the question, adopting the Third Circuit's approach "[w]ith little elaboration." Pet. at 9; *see Greene*, 409 F.3d at 794-95. The absence of a deep and mature circuit split at this time makes further review unwarranted.

## II. Even If This Court Wishes To Consider The Preemption Question, The Opinion Below Does Not Present A Suitable Vehicle Because The Result Is Supported By Independent State-Law Grounds

Even if this Court wishes to decide the extent to which federal aviation safety standards preempt those of the States, this case does not provide a suitable vehicle for doing so because the decision below could have rested on independent state-law grounds. The Sixth Circuit panel

below did not need to decide the question of whether federal law preempts state aviation safety standards because the dismissal of Petitioner's failure-to-warn claim was dictated by her failure to prove that the gyroscope manufactured by Respondent suffered from a manufacturing defect.

The district court accurately described the heart of Petitioner's failure-to-warn claim as an "assertion that [Respondent] was negligent in failing to maintain a comprehensive database documenting trends of problems with [Respondent's] vertical gyroscopes." Pet. App. D at 50a. Throughout these proceedings, Petitioner has premised her failure-to-warn claim on the existence of a manufacturing defect. *See Greene*, 409 F.3d at 794 ("Greene argued that Goodrich breached its *duty to warn* users of aircraft that contained a vertical gyroscope *about the gyroscope's manufacturing defects.*") (emphasis added). Under federal law as well as Kentucky law, Petitioner is bound by the terms of her prior pleadings. *See Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 549 (6th Cir. 2000) ("Plaintiffs are bound by admissions in their pleadings . . . ."); *State Farm Auto Mut. Ins. Co. v. Kegley*, 168 S.W.2d 2, 3 (Ky. 1942); *see also Dolan v. Roth*, 325 F. Supp. 2d 122, 130 (N.D.N.Y. 2004) ("[T]he court is 'bound to accept [p]laintiff['s] characterization of [his] own claims.'" (quoting *Viriglio v. Motorola, Inc.*, 307 F. Supp. 2d 504, 512 (S.D.N.Y. 2004)).

In its decision below, the Sixth Circuit held as a matter of law that Petitioner failed to prove that the gyroscope manufactured by Respondent suffered from a manufacturing defect, and that the district court should have granted Respondent's Motion for Judgment as a Matter of Law on this claim. *Greene*, 409 F.3d at 791, 794.

Because Petitioner has consistently maintained that her failure-to-warn claim is predicated on the existence of a manufacturing defect, the Sixth Circuit's rejection of her manufacturing-defect claim is fatal to her failure-to-warn claim. The Sixth Circuit could have decided the case on this ground and avoided the preemption issue entirely. Therefore, even if this Court were to determine that the Sixth Circuit erred in holding that federal law preempts any state-law duties in the field of aviation safety, the result reached by the court below would be supported by independent state-law grounds. This Court should therefore deny certiorari.

## III. The Sixth Circuit's Decision Below Is Correct, And A Contrary Result Would Have Harmful Consequences For Regulation Of The Aviation Industry

The decision below is correct, and a result contrary to the one reached by the Sixth Circuit would wreak havoc on the federal government's ability to impose a uniform set of regulations governing the aviation industry. Petitioner argues that Respondent breached its duty to warn the public of defects in its gyroscopes by failing to maintain a database of "malfunctions" and "employee concerns of gyro[scope] system weaknesses" that would have facilitated communications between Respondent's "manufacturing, quality assurance and [] field repair facilities." *Greene*, 409 F.3d at 794 (quoting Petitioner's expert witness). Both the district court and the Sixth Circuit noted correctly that federal regulations require no such database. Pet. App. D at 50a; *Greene*, 409 F.3d at 794. Allowing this claim to prevail would lead to the absurd result whereby private tort litigants could mandate an

endless variety of conflicting standards for the aviation industry. *See French*, 869 F.2d at 6 (noting that "a patchwork of state laws in this airspace . . . would create a crazyquilt effect"). Private litigants' ability to impose regulations would be limited only by the creativity of their hired experts in proposing abstract theories never contemplated by the Federal Aviation Administration. Allowing such regulation by private litigants would be completely unworkable and would undermine federal regulators' authority to oversee the aviation industry. The correct result reached by the Sixth Circuit weighs in favor of denying certiorari.

## IV. Petitioner's Second Question Presented Is A Highly Factbound Request For Error Correction And Does Not Merit This Court's Review

Petitioner's challenge to the Sixth Circuit's holding with respect to the sufficiency of the evidence is highly factbound and does not warrant the grant of certiorari. Petitioner explores at length the technical testimony and other evidence presented at trial, but fails to argue that the panel's holding deepens a circuit split or presents a question of national importance. *See* Pet. 11-20. Rather, Petitioner simply seeks error correction of the panel's characterization of the evidence. This Court has noted that its function "is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law and to exercise supervisory power over lower federal courts." *United States v. Young*, 470 U.S. 1, 34 (1985). Petitioner's request does not merit this Court's attention and should be denied.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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